APPENDIX A

Title 36, Pennsylvania Statutes

Turnpike Act

§ 652d. Turnpike Commission created; powers and duties; salaries

That there is hereby created a commission to be known as the "Pennsylvania Turnpike Commission" and by that name the commission may sue and be sued, plead and be impleaded, contract and be contracted with, and have an official seal. The commission is hereby constituted an instrumentality of the Commonwealth, and the exercise by the commission of the powers conferred by this act in the construction, operation and maintenance of the turnpike shall be deemed and held to be an essential governmental function of the Commonwealth. The commission shall consist of five members, and the Secretary of Highways shall be a member ex officio. The four remaining members shall be appointed by the Governor by and with the advice and consent of two-thirds of the members of the Senate, and shall be residents of the Commonwealth of Pennsylvania at the time of their appointment and qualification, and shall also at such time have been qualified electors therein for a period of at least one year next preceding their appointment. * * * The Commission shall make necessary rules and regulations for its own government and shall have power and authority to acquire, own, use, hire, lease, operate and dispose of personal property, real property and interests in real property, and to make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act, and to employ engineering, traffic, architectural and construction experts and inspectors and attorneys, and such other employes as may be necessary in its judgment, and fix their compensation: Provided, however, That all contracts and agreements relating to the construction of the turnpike and connecting tunnels and

bridges shall be approved by the Department of Highways, and the turnpike and connecting tunnels and bridges shall be constructed under the supervision of the Department of Highways. * * * 1937, May 21, P.L. 774, No. 211, § 4.

§6602 Construction of turnpike authorized; location; bonds authorized

In order to facilitate vehicular traffic across the Commonwealth and to provide additional traffic facilities to the industrial communities of the northeastern section of the Commonwealth, the Pennsylvania Turnpike Commission heretofore created by virtue of the provisions of the act approved the twenty-first day of May, one thousand nine hundred thirty-seven (Pamphlet Laws 774), and the supplements and amendments thereto, is hereby authorized and empowered to construct, operate and maintain a turnpike at such location as shall be approved by the Governor and the Department of Highways, from a connection with the Pennsylvania Turnpike System, at such point east of the Susquehanna River as the Pennsylvania Turnpike Commission may decide is most feasible and practicable, to a point on or near the boundary line between the Commonwealth of Pennsylvania and the State of New York, between the Susquehanna River at Sayre and the Delaware River, including a central connection extension from a point on the Northeastern Extension westwardly to a point at or near the Susquehanna River and a central connection extension from a point on the Northeastern Extension eastwardly to a point at or near the Delaware River, together with connecting roads, tunnels and bridges; and further, to issue turnpike revenue bonds of the Commonwealth, notes or other obligations, payable solely from revenues of the Commission, including tolls, or from such funds as may be available to the Commission for that purpose, to pay the cost of any and all construction. 1951, Sept. 27, P.L. 1340, §2, as amended 1953, July 28, P.L. 693, §2.

* * * * * * * *

§660.4 Definitions

The following words and terms shall have the following meanings:

(a) The word "Commission," shall mean the Pennsylvania Turnpike Commission heretofore created by the act, approved the twenty-first day of May, one thousand nine hundred and thirty-seven (Pamphlet Laws 774), or if said Commission shall be abolished, any board, commission or officer succeeding to the principal functions thereof or upon whom the power and functions given by this act to said Commission shall be given by law.

(b) The word "owner" shall include all individuals, copartnerships, associations or corporations having any title or interest in any property rights, easements or franchises authorized to be acquired by this act.

(c) The words "the turnpike" shall mean the turnpike to be constructed, as hereinafter provided, from a connection with the Pennsylvania Turnpike System east of the Susquehanna River to a point on or near the boundary line between the Commonwealth of Pennsylvania and the State of New York, between the Susquehanna River at Sayre and the Delaware River, including a central connection extension from a point on the Northeastern Extension westwardly to a point at or near the Susquehanna River and a central connection extension from a point on the Northeastern Extension eastwardly to a point at or near the Delaware River, and may be constructed as a whole at one time or in sections from time to time, as the Commission shall determine, and shall be deemed to include not only the turnpike and all connecting roads, tunnels and bridges connected therewith, but also all property rights, easements and franchises relating thereto and deemed necessary or convenient for the construction or the operation thereof.

(d) The term "cost of the turnpike" shall embrace the cost of constructing the turnpike and all connecting roads,

tunnels and bridges, the cost of all lands, property rights, rights of way, easements and franchises acquired, which are deemed necessary or convenient for such construction, the cost of all machinery and equipment, financing charges, interest prior to and during construction and for one year after completion of construction, cost of traffic estimates and of engineering and legal expenses; plans, specifications, surveys, estimates of cost and of revenues, other expenses necessary or incident to determining the feasibility or practicability of the enterprise, administrative and legal expense, and such other expenses as may be necessary or incident to the financing herein authorized, the construction of the turnpike and connecting roads, tunnels and bridges, the placing of the same in operation, and the condemnation of property necessary for such construction and operation. Any obligation or expense contracted for by the Commission with the Department of Highways of the Commonwealth of Pennsylvania, or with the United States or any agency thereof, for traffic surveys, preparation of plans and specifications, supervision of construction, and other engineering, administrative and legal services and expenses in connection with the construction of the turnpike or any of the connecting roads, tunnels and bridges, shall be regarded as a part of the cost of the turnpike, and shall be reimbursed or paid out of the proceeds of the turnpike revenue bonds, notes or other obligations hereinafter authorized. Payment of any notes or other obligations shall be considered payment of the cost of the turnpike provided such notes or other obligations shall be considered payment of the cost of the turnpike provided such notes or other obligations were issued for such purpose. 1951, Sept. 27, P.L. 1340, §4, as amended 1953, July 28, P.L. 693, §3.

§669.5 Essential governmental function

The exercise by the Commission of the powers conferred by this act in the construction, operation and maintenance

of the turnpike shall be deemed and held to be an essential governmental function of the Commonwealth. 1951, Sept. 27, P.L. 1430, §5.

§660.6 Powers and duties of Commission

The Commission shall have the following powers and duties:

(a) It shall maintain a principal office at such place as shall be designated by the Commission.

(b) The Commission may contract and be contracted with in its own name.

(c) The Commission may sue and be sued in its own name, plead and be impleaded: Provided, however, That any and all actions at law or in equity against the Commission shall be brought only in the proper courts at the County of Dauphin.

(d) The Commission shall have an official seal.

(e) The Commission shall make necessary rules and regulations for its own government, and shall have power and authority to acquire, own, use, hire, lease, operate, and dispose of, personal property, real property and interests in real property, and to make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act, and to employ engineering, traffic, architectural and construction experts and inspectors, and attorneys, and such other employes as may in its judgment be necessary, and fix their compensation: Provided, however, That all contracts and agreements relating to the construction of the turnpike and connecting roads, tunnels and bridges shall be approved by the Department of Highways, and the turnpike and connecting roads, tunnels and bridges shall be constructed under the supervision of the Department of Highways.

(f) The turnpike when completed and opened to traffic shall be maintained and repaired by and under the control

of the Commission through the Department of Highways of the Commonwealth, and all charges and costs for such maintenance and repairs actually expended by said Department of Highways shall be paid to it by the Commission, upon certification thereof, out of tolls. Such turnpike shall also be policed and operated by such force of police, tolltakers and other operating employes as the Commission may, in its discretion, employ.

(g) The Commission shall have authority, at its own cost, to provide grade separations with respect to all public roads and State highways intersected by the turnpike and to change and adjust the lines and grades thereof so as to accommodate the same to the design of such grade separation: Provided, however, That the damages incurred in changing and adjusting the lines and grades of such public roads and State highways shall be ascertained and paid by the Commission in the same manner as is provided for by this act in regard to the location and construction of the turnpike.

(h) If the Commission shall find it necessary to provide a grade separation or change the site of any portion of any State highway or public road, or vacate the same, it shall cause it to be reconstructed and restored forthwith, at the Commission's own proper expense, on the most favorable location and in as satisfactory a manner as the original road, or vacate it, as the case may be: Provided, That the method of acquiring the right-of-way and determining damages incurred in changing the location of or vacating such road or State highway shall be ascertained and paid for by the Commission in the same manner as is provided for by this act in regard to the location and construction of the turnpike. In such cases, the plan of such reconstruction and restoration or vacation shall be submitted to the supervisors of the proper township for approval, and in the event of failure of the supervisors to approve the plan, then it shall be submitted to the Department of Highways for final approval. In the case

of State Highways, the plan shall be submitted to the Department of Highways for its approval.

(i) The Commission shall also have authority to petition the court of quarter sessions of the county wherein is situate any public road or part thereof affected by the location therein of the turnpike, for the vacation, relocation or supply of the same, or any part thereof, with the same force and effect as is now given by existing laws to the inhabitants of any township of such county, and the proceedings upon such petition, whether it be for the appointment of viewers or otherwise, shall be the same as provided by existing law for similar proceedings upon such petitions.

(j) The Commission shall otherwise have all of the powers and perform all of the duties prescribed by the act, approved the twenty-first day of May, one thousand nine hundred and thirty-seven (Pamphlet Laws 774), and any supplements or amendments thereto.

(k) Adequate compensation shall be made by the Commission out of funds provided under the authority of this act for damage to all public or private property taken, injured or destroyed in carrying out the powers granted by this act, or such property may be restored or repaired and placed in its original condition as nearly as practicable, as the Commission may deem it expedient in any particular case. (1951, Sept. 27, P.L. 1430, §6.

§660.18 Turnpike to be part of state highway system when obligations paid or payment provided for

When all bonds, notes or other obligations and the interest thereon shall have been paid, or a sufficient amount for the payment of all bonds, notes or other obligations and the interest to maturity thereon shall have been set aside in trust for the benefit of the holders of such bonds, notes or other obligations and shall continue to be held for that purpose, the turnpike and the connecting roads, tunnels and bridges shall become a part of the system of

State highways and shall be maintained by the Department of Highways free of tolls; and thereupon, the Commission shall be dissolved, and all funds of the Commission not required for the payment of the bonds, notes or other obligations, and all machinery, equipment and other property belonging to the Commission, shall be vested in the Department of Highways. 1951, Sept. 27, P.L. 1430, §18.

STATE HIGHWAY ACT

§670—102. Definitions

When used in this act, the following words and phrases shall have the following meanings:

(1) "State highway" shall mean and include all roads and highways taken over by the Commonwealth as State highways under the provisions of any act of Assembly. Unless clearly so intended, the term shall not include any street in any city, borough or incorporated town, even though the same may have been taken over as a State highway.

(2) • • •

(3) • • •

(4) • • •

1945, June 1, P.L. 1242, art. I, §102.

§670—103. Excluded provisions

This act does not include any provisions of, and shall not be construed to repeal:

(1) • • •

(2) • • •

(3) • • •

(4) Any law administered by the Pennsylvania Turnpike Commission;

(5) • • •

(6) • • •

(7) • • •

(8) * * *

(9) * * *.

(10) Any amendment or supplement of any of the laws referred to in this section. 1945, June 1, P.L. 1242, art. I, §103.

* * * * * * *

§670—401. Duty on department of highways

The department shall construct or improve, and thereafter maintain and repair, at the cost and expense of the Commonwealth, the highways forming the plan or system of the State highways, in the several counties and townships. Such improvement and maintenance shall be made according to specifications to be prepared by the department, as regards the character, construction, and material to be used. The work of construction and maintenance of said State highways shall be done under the direction and supervision of the secretary. The secretary, in addition to the powers conferred upon him in this act, shall enjoy and possess, in the construction and maintenance of State highways, all the rights and powers conferred by existing laws on supervisors or commissioners in townships in the construction or maintenance of township roads. 1945, June 1, P.L. 1242, art. IV, §401.

APPENDIX B

Docket Entry

DECISION

The order and judgments of the Superior Court are affirmed on the opinion of President Judge Rhodes, reported at 190 Pa. Superior Ct. 179.

PER CURIAM.

MR. JUSTICE BELL filed a concurring and dissenting opinion in which MR. JUSTICE B. R. JONES joins.

MR. JUSTICE COHEN took no part in the consideration or disposition of this case.

Opinion of the Court

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

Nos. 35, 37, 39 and 41 May Term, 1960

No. 35—Appeal of Clayton A. Landsidle
No. 37—Appeal of Charles W. Stickler
No. 39—Appeal of Thomas J. Evans
No. 41—Appeal of James F. Torrance

COMMONWEALTH

v.

THOMAS J. EVANS, JAMES F. TORRANCE, JOHN D. PAUL, THEODORE S. PAUL, CHARLES W. STICKLER, CLAYTON A. LANDSIDLE, PAUL J. McNEILL, G. J. HUDERT, E. J. DONNELLY

Nos. 36 and 38 May Term, 1960

No. 36—Appeal of Clayton A. Landsidle
No. 38—Appeal of Charles W. Stickler

COMMONWEALTH

v.

CHARLES W. STICKLER and CLAYTON A. LANDSIDLE

No. 40 May Term, 1960

COMMONWEALTH

v.

THOMAS J. EVANS, *Appellant*

No. 42 May Term, 1960

COMMONWEALTH

v.

JAMES F. TORRANCE, *Appellant*

Appeals from Order and Judgments of the Superior Court at Numbers 29, 30, 31, 32, 33, 34, 36 and 37 March Term 1959 affirming Judgments of sentence of the Court of Quarter Sessions of Dauphin County dated June 5, 1958.

PER CURIAM. FILED: April 21, 1960

The order and judgments of the Superior Court are affirmed on the opinion of President Judge Rhodes, reported at 190 Pa. Superior Ct. 179.

Mr. Justice Bell filed a concurring and dissenting opinion in which Mr. Justice B. R. Jones joins.

IN THE SUPREME COURT OF PENNSYLVANIA

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Appeals from Order and Judgments of the Superior Court at Numbers 29, 30, 31, 32, 33, 34, 36 and 37 March Term 1959 affirming Judgments of sentence of the Court of Quarter Sessions of Dauphin County dated June 5, 1958.

Concurring and Dissenting Opinion

BELL, J. FILED: April 21, 1960

A gigantic fraud was perpetrated on the Commonwealth of Pennsylvania in connection with the construction of a part of the Northeastern Extension of the Pennsylvania Turnpike, for which a number of people have been convicted and duly sentenced. Evans, a former Chairman of the Commission, and Torrance, a former member and former Secretary-Treasurer of the Commission, were convicted on separate indictments of misbehavior in office and of conspiracy with others to cheat and defraud the Pennsylvania Turnpike Commission. The Superior Court unanimously reversed the conviction of Torrance on the charge of misbehavior in office, reversed the judgment of sentence of one Paul J. McNeill on the indictment charging conspiracy, and by a vote of four to three sustained a conviction of Evans, Torrance and two others on the conspiracy charge.

The crime of conspiracy for which these defendants were convicted "arose principally out of a contract dated February 28, 1955, between the commission and Manu-Mine." *Commonwealth v. Evans, et al.*, 190 Pa. Superior Ct. 179; 195. The purpose of the contract was to provide surface support for the right-of-way of the Northeastern Extension of the Turnpike across the anthracite coal regions by the use of slushing material into mine voids underlying the roadway area, which land had been appropriated by the Commission for part of the Northeast Highway.

The basic questions involved in these appeals are twofold: (1) Was the Commonwealth's evidence legally sufficient to prove beyond a reasonable doubt that *each* of these particular defendants was guilty of criminal conspiracy to perpetrate this fraud; and (2) Did the admission of Paul's testimony constitute reversible error?

The contract of February 28, 1955, made by the Commission and Manu-Mine Company was first negotiated and approved by the Turnpike Commission's engineers. The contract was then approved by the Commission's consulting engineers, then by counsel for the Commission, and finally by 14 other people representing the Commonwealth. All of these men, at least at first blush, appear to be as innocent or guilty as Torrance.

It was the theory of the Commonwealth that the defendants had conspired to defraud the Commission by obtaining this contract, and that the drilling and slushing program recommended by Manu-Mine was in fact 95% unnecessary, and that the price for drilling was unconscionably excessive and fraudulent, especially since Manu-Mine had represented that the contract cost per foot of drilling had been computed on the basis of the cost plus only 10 per cent profit.

The Pennsylvania Turnpike Commission was composed on February 28, 1955 of Evans, Chairman, Torrance,

McSorley (succeeding Chairman) and Lawler (who shortly thereafter became Acting Chairman), and Watson. Manu-Mine Company or its officers and stockholders made a profit from this contract, with the Commission variously estimated at from 4 to 10 million dollars. Evans' term expired June 30, 1955. All of the Commissioners (except Watson who was dead) denied that they had committed any fraud, denied any conspiracy or knowledge thereof, and denied any and all wrong-doing. Of the five Commissioners only Evans and Torrance were accused, or arrested, or indicted for conspiracy and fraud.

Torrance's Appeal

Lawler testified in behalf of the Commonwealth: "Q. Do you mean to tell us that you voted for and did vote for the awarding of the contract and the doing of the work without knowing what was involved? [Lawler had actually visited the scene of the work, and the Secretary of Highways had had a representative of his department assigned to the work, and 14 different people had approved *each* payment received by Manu-Mine.] A. I depended upon the legal counsel, I depended upon our engineering staff, I depended upon our consulting engineers. That is why the Turnpike has retained these people to advise and instruct us Commissioners." This, as Torrance testified, is exactly the explanation of and the reason why he voted for the contract, as did Lawler, McSorley and Watson. Evans and McSorley were successful business men; the other members of the Commission were experienced in politics and had held public office. No one pretends and no one could successfully contend that McSorley and Lawler and Watson were dupes of Torrance.

Lawler gave as his explanation for his approval of the contract not only a proper and justifiable reason, but the only answer that an honest man could give. Public officials must frequently rely upon their deputies and assistants.

These officials cannot be held criminally responsible for the negligence, or even for criminal acts of their deputies and assistants under circumstances such as these. We must never forget that the Commonwealth cannot prove a criminal case by suspicion or conjecture; it must prove it by evidence of facts and circumstances which are of such a nature and quality as to establish the guilt of each defendant beyond a reasonable doubt. *Commonwealth* v. *Klaiber*, 378 Pa. 412, 106 A. 2d 820; *Commonwealth* v. *Sanders*, 390 Pa. 379, 134 A. 2d 890; *Commonwealth* v. *Kravitz*, . Pa. .

The contract was negotiated for the Commission by its engineer Paul. Torrance voted for the contract with Manu-Mine dated February 28, 1955, as did all the other members of the Commission, after it was approved, we repeat, by the Commission's engineers, by the Commission's consulting engineers, by counsel for the Commission, and by 14 other people representing the Commonwealth. There is absolutely no evidence that any of the Commissioners suggested or dictated any of its terms or even saw the proposed contract prior to the hearing at which it was approved.

What did Torrance do that was wrong or criminal? And what did he do that was different from what Lawler, McSorley and Watson did, who were never accused of wrongdoing or indicted for this crime? The only evidence of any substance whatsoever to convict Torrance was:

(1) That Manu-Mine Company and or its officers and stockholders, *with which he had absolutely no connection directly or indirectly*, made a profit of $4 million dollars;

(2) That "On December 21, 1954 Torrance received from Stickler a Christmas gift certificate* which he used on May 5, 1955 to purchase a suit of clothes." Obviously

* One of the engineers who was acquitted received a television set as a Christmas present from Stickler in 1954.

this was not only unethical, but highly reprehensible. However, it doesn't prove, as the Commonwealth argues, that he was a co-conspirator with Evans, Stickler, Landsidle and others to defraud the Turnpike Commission of millions of dollars;

(3) That Torrance, who is a farmer, built a trench silo in an old quarry on his farm at a cost of approximately $500. Stickler saw him at the farm show and asked him to permit him to insert on the silo, *which was then already built and ready for use*, a new type of wall which Manu-Mine hoped to market for silos. Torrance, in the light of hindsight, foolishly accepted this offer; and Torrance invited photographers and newspaper men to his farm to see this wall which had been put up by Manu-Mine. Pictures and information about Torrance's silo wall and that Manu-Mine was the builder were published in National Farm Journals, newspapers and magazines throughout Pennsylvania.

The theory of the Commonwealth was that it could not possibly have been defrauded of 4 to 10 million dollars unless Evans and Torrance conspired with others to enable Manu-Mine or its officers and stockholders to illegally make a colossal fraudulent profit on this engineering project. If Torrance was a conspirator he was an absolutely indispensable *master* party to the conspiracy. If Torrance was going to enable other persons to make millions of dollars out of this contract, isn't it contrary to reason and all human experience that he would do so for a $200. Christmas present and a *publicly* exposed* unnecessary

* What is the distinction, where is the line drawn, between the acts and conduct of public officials and those having a proper legitimate interest in legislation or in matters coming before the public official or public body? What conduct and which acts are proper and which are improper? The Country was startled and shocked by newspaper revelations of large *secret* gifts to public officials during the Truman Administration. The Country was similarly shocked by the revelation of secret loans or gifts to a

outer silo wall? The logical inference to be drawn from Torrance's use of the gift certificate is that he was *not* a member of the conspiracy. If he was even suspicious that a scheme or conspiracy existed to defraud the Commonwealth of millions of dollars, would he, in the light of his age and reputation, have joined the conspiracy *as one of its two indispensable mister crooks*, or even permitted suspicion to be poined at him for the sake of a suit of clothes? Isn't the only reasonable inference which can be drawn from his acceptance of the gift certificate, that he knew nothing of the conspiracy or its fraudulent scheme?

'It is equally unreasonable and illogical to contend that Torrance's acceptance and publicizing of a new type of wall which Manu-Mine hoped to market for silos prove beyond a reasonable doubt that he conspired to swindle and defraud the Commonwealth of 4 to 10 million dollars, not for himself, but for the sole benefit of Manu-Mine, its officers and stockholders, with which he had no connection directly or indirectly. When a person intends or plans to commit a crime, he goes about it *clandestinely and*

'Presidential Assistant during the Eisenhower Administration. There are revelations every week of open and secret entertainment of National and State public officials, of yachting parties and plane trips, of pleas by Senators and Congressmen for television stations for a friendly constituent in their State, of public and private entertainment and television sets and gifts given to members of the legislature of Pennsylvania when it adjourns—by persons or companies having business or legislation with or before such public officials or public bodies. With two exceptions not here relevant, none of these men were charged with crime or arrested or indicted for conspiracy or misdemeanor in office or for any crime. Where is the line between what is proper and improper and what is criminal? Isn't it high time, isn't it imperative in order to protect honest public officials and honest men having business with them that a code of ethics be forthwith adopted so that *everyone* may know—without fear of accusations or suspicions—what are his rights and limitations, what is honest and dishonest, proper and improper, legitimate and criminal?

attempts to hide from the public both his identity and every one of his acts which could be linked to the crime. Certainly he does not publicize to the world, as Torrance did, his silo wall and that it was built by and can be bought from Manu-Mines. Instead of being evidence in behalf of the Commonwealth to prove Torrance guilty of fraud, it is more reasonable and logical to say that it demonstrates that he was *not* a party to the crime. Yet these were the two rocks on which the Commonwealth built its entire case. This was the evidence which the Commonwealth contends is legally sufficient to sustain the conviction *beyond a reasonable doubt* of a 70 year old man who all his life has had an outstanding reputation for honesty.

In the light of prevailing practices in Harrisburg and Washington, some of which I consider reprehensible, but none of which are considered criminal, and especially in view of the trifling amount of these gifts in comparison with the multi-million dollar profits which Torrance allegedly fraudulently enabled Manu-Mine to obtain, will the law allow the Commonwealth to say that it proved beyond a reasonable doubt that one of the two alleged *master* crooks was guilty of this multi-million dollar fraudulent swindle because he took as his share of the 4 million dollar loot a $200 Christmas gift certificate and a publicly advertised unnecessary wall on his $500 silo? How unrealistic, and with all due deference to others, how ridiculous can we be?

In *Commonwealth* v. *Kloiber*, 378 Pa. 412, 106 A. 2d 820, the Court said (pages 426, 427): "... it is clearly settled that a man may be convicted on circumstantial evidence alone, provided his guilt is proved beyond a reasonable doubt: [citing cases] ..." "... The circumstantial evidence in this case [i.e., the facts and circumstances proved in *Commonwealth* v. *Bausewine*, 354 Pa. 35, 46 A. 2d 491] is not such "as reasonably and naturally to

justify an inference of the guilt of the accused, . . . and of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt'': [citing cases].' ''

In *Commonwealth* v. *Bausewine*, supra, this Court, in reversing a conviction for bribery and discharging the defendant, said (pages 40-41): ''The testimony adduced by the Commonwealth is weak and inconclusive. . . .

''The burden devolved upon the Commonwealth to overcome the presumption of defendant's innocence and to establish, beyond a reasonable doubt the fact that he had accepted money to influence him as a police officer to act contrary to known rules of honesty and integrity. While the mere fact that the evidence adduced is wholly circumstantial is not fatal to the Commonwealth's case (Commonwealth v. DePetro, 350 Pa. 567, 577, 39 A. 2d 838), yet it must be remembered that guilt must be proved and not conjectured. The reasonable inference of guilt must be based on facts and conditions proved; it cannot rest solely on suspicion or surmise. These do not take the place of testimony. The facts and circumstances proved must, in order to warrant a conviction, be such as to establish the guilt of the defendant, not . . . as being absolutely incompatible with his innocence, but at least beyond a reasonable doubt. The circumstantial evidence in this case is not such 'as reasonably and naturally to justify an inference of the guilt of the accused, . . . and of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt': Commonwealth v. Marino, 142 Pa. Superior Ct. 327, 16 A. 2d 314; Commonwealth v. Libonati, 346 Pa. 504, 508, 31 A. 2d 95; Commonwealth v. Holt, 350 Pa. 375, 387.''

In *Commonwealth* v. *Rogozinski*, 387 Pa. 399, 128 A. 2d 28, the Court said (page 402):

"'The requirement of the law is that in order to warrant a conviction the facts and circumstances proved must be of such character as to . . . [prove] the guilt of the accused beyond any reasonable doubt . . . and that doubt is for the jury unless the evidence "be so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances".': Commonwealth v. Libonati, 346 Pa. 504, 508, 31 A. 2d 95."

I agree with three Judges of the Superior Court that the Commonwealth's evidence was legally insufficient to prove Torrance guilty beyond a reasonable doubt of the crime of fraudulent conspiracy of which he was convicted. *I am convinced* that the judgment against Torrance should be arrested and he should be discharged!

Evans's Appeal

I turn now to Evans's appeal. The Commonwealth's evidence was more than adequate if believed, as it was by the jury, to convict Evans. However, all the Judges of the Superior Court agreed, and I certainly agree, that a number of trial errors were committed during this trial. The Superior Court, by a vote of 4 to 3, disagreed as to whether the errors were harmless or were so prejudicial as to be reversible errors. I find it necessary to discuss only one of them.*

* Some of the questions in these appeals bothered me, as they obviously bothered the Superior Court. President Judge Rhodes wrote an exhaustive able opinion of 77 pages. Judge Woodside wrote, and able concurring and dissenting opinion, in which he analyzed with more particularity several of the important questions raised by Torrance and Evans. Judge Watkins likewise wrote an able opinion, especially in connection with the baffling problems of flushing and subsidence in the coal regions, with which he is an experienced expert. Judge Watkins also devoted a considerable part of his elaborate 31 page opinion to the reasons for the indictment and conviction of Evans and Torrance, which he charged were solely political. I deem it unnecessary to consider these points.

I believe that realistically and practically an errorless trial would have been impossible, considering the nature and length of this trial, which began June 4 and ended July 25, 1957. The testimony totaled over 5000 pages.

In *Commonwealth* v. *Fuqua*, 330 Pa. 4, 198 A. 99, Chief Justice MAXEY, speaking for a unanimous Court, said (page 18):

"There is seldom any criminal or civil trial of any magnitude or duration into the record of which some irrelevant, incompetent and immaterial testimony does not 'creep' and has been subsequently 'stricken out' and the jury instructed to 'disregard it.' To grant new trials whenever such a thing occurred would mean an interminable and intolerable succession of new trials. There is no standard by which the effect of such formally 'sterilized' testimony on the minds of the jury can be gauged. In theory the law intends that no testimony shall have any but a logical effect on juror's minds; in practice, nearly all testimony has both a logical and a psychological effect in varying ratios. The law intends that no witness's testimony shall make any appeal except to the jurors' reasoning faculties; in actual practice, a witness's testimony sometimes makes more of an appeal to the emotions than to the reason."

It is, I believe, humanly impossible to set up a test or standard which can demonstrate definitely or with mathematical certainty whether a jury was able to eliminate from its mind and decision, certain incompetent evidence, or whether that evidence was of such a nature and character that notwithstanding the instructions or admonitions of the trial Judge, it remained in and influenced and prejudiced their minds. The best definition of a harmless error is that given by Justice (former Chief Justice) Horace STERN, in *Commonwealth* v. *Neill*, 362 Pa. 507, 67 A. 2d 276, where, in discussing the effect of an improper suggestion made by the District Attorney to the effect that

defendant had attempted to commit an act of sexual perversion, the Court said (page 517): ". . . the question itself, irrespective of its form, was highly reprehensible, because there was nothing whatever in the testimony to indicate that any such offense had been committed or attempted. However, the learned trial Judge, in vigorous language, admonished the jury to expunge from their minds what had thus been intimated, and cautioned them to give no credence to it but to exclude it wholly from their consideration. The test in such case is *whether the jury may have been so strongly influenced* by the improper introduction of such an insinuation *that the effect of it on their minds could not likely be dispelled by the court's subsequent instruction to disregard it:* Commonwealth v. Fugmann, 330 Pa. 4, 17-20, 198 A. 99, 106, 107. In the present instance we do not believe that the jury could have been so influenced, for they must immediately have realized that there was no basis for the District Attorney's 'suggestion'. Be this as it may, it is safe to conclude that, in view of the established, even admitted, atrocity of the crime, this incident was not a contributing factor in the determination of the penalty."

The best that any Judge can do is to conscientiously apply this test in each case where the question of harmless or prejudicial and reversible error is raised.

John D. Paul was indicted as one of the conspirators. Paul's testimony before the Grand Jury (which was so lengthy that it covered approximately 300 pages) was admitted in this trial and was read in full to the jury under the theory that it was a confession or a so-called admission against interest and was therefore admissible against him. It was certainly not a confession and it is likewise questionable whether it rose to the height of an admission against interest. Paul was acquitted. The vice of Paul's Grand Jury testimony was two-fold: (1) it contained highly incompetent testimony, hearsay testi-

mony, and his *guesses*, inferences, conjectures and conclusions, and (2) it was *highly prejudicial to Evans*. Paul's testimony was in reality an attempt to incriminate the other defendants, particularly Evans. In order to determine how highly prejudicial to Evans some of Paul's *grossly* incompetent testimony was, I shall quote a few excerpts therefrom:

"Q. Have you given any consideration to the timeliness of August 25th, 1953, and September 1953, in the light of events that have later occurred? A. Frankly, no, as of this minute I had not. Q. Does it seem to you *as of this minute* that there is any significance to attach to those periods of time? A. There might have been. Q. *What might have been*? A. It might have been in somebody's mind; certainly not mine. Q. Well, what might have been in someone's minds that you can think of at this point that *might incite your curiosity*? A. My curiosity now has been developed somewhat by the coincidence, we will call it, of those two dates, insofar as perhaps later activities of Manu-Mine *might have been concerned in somebody's mind*. Q. *What mind are we thinking of* at this moment, sir, that is particularly attractive to your thinking at this moment; what mind would you be attracted to? A. *The only mind* that I would know *that might be at all interested* in Manu-Mine *would be Mr. Evans*, Chairman of the Commission. . . . Q. What would that have possibly entailed if you had given such consideration to those thoughts that would have come through your mind? A. Well, undoubtedly I would have been told that, maybe rather broadly, that it was none of my business, or something like that. Q. In order to convey it to the Grand Jury, we have to do it through what you were thinking. We have to convey it by words, and you have done it very descriptively. Do you think this was a foregone conclusion that Mr. Stickler was going to operate in this field and all you could do was go along with it? A. Well, to what extent Mr. Stickler was received, I think that that was a pretty foregone

conclusion that he would get the job, . . . A. . . . and someone besides Mr. Evans, I believe it was Mr. Torrance, and the question was: 'Don't you think we ought to do something about the Department of Mines on this case? Q. Who made that statement, sir? A. I believe it was Mr. Torrance. . . . Q. What was Mr. Evans' reaction to Mr. Torrance's inquiry? A. 'No, we don't want that.' . . . Q. Mr. Evans did not want the Department of Mines in this matter, did he? A. No. Q. That was pretty definitely understood by you, was it? A. *I had that impression.* . . . Q. *Why did you conclude* that Mr. Evans didn't want the Department of Mines involved in this? A. Well, actually I don't think I examined *his motive* for thinking so at the time. Q. *Have you since that time examined it?* A. Oh, I thought about it a great deal in the past six or eight months. Q. *What has been the conclusion that your thinking has resolved itself into*, sir? A. Simply this: That the Department of Mines presumably has in its possession or in its record a full supply of maps of all mining work; and that information should be available alone. Now, the question of whether to employ Department of Mines personnel, whether that could be done or not, is quite another story, or was in my mind then. Since then it has, of course, been done, and we employed—I mean the Commission paid for their assisting personnel. So that it no doubt would have been just as possible earlier as it was later. Q. Let's give it a little more validity, sir, to the conclusion, I believe. Isn't this a fact: If the Department of Mines had been consulted it would have done just what it has already done and there wouldn't be any Manu-Mine contract? A. I believe that is a fair statement. Q. In other words, Manu-Mine couldn't have gone into a contract that more than $10 million had been paid on if the Department of Mines had been consulted, *isn't that a fair conclusion?*. A. *I think so.* Q. So, therefore; Mr. Evans, didn't want the Department of Mines involved in this matter, did he? A. That was clear enough to me. Q. So

if the Department of Mines had been involved, Mr. Evans' nephew would not have been involved, is that right? A. I think that is true too. . . . Q. We want to know why, sir. Do you have a reason to ascribe for that? A. The only reason I can ascribe to that is that Mr. Evans might have thought that I would get the contract set up perhaps sooner than Mr. Stone, or something like that; *maybe he had a special purpose in the back of his mind at the time.* Q. *What could that have been?* A. Well, probably another purpose which could have been in the back of his mind was that I was the man who would, say, be duped, put it that way, or, at least, carry out his order to his satisfaction. Q. In other words, or have you now concluded that Mr. Evans did think that he might more easily have you handle the contract of February 28, 1955, than Mr. Roger Stone? A. I would conclude that, yes, sir. Q. There is a reason, isn't there, sir, for most every bit of human conduct? A. Correct. Q. You have ascribed that as a reason, and you have had an opportunity to reflect on it, have you not, sir? A. Yes, sir. Q. That is your considered opinion this afternoon, isn't it? A. Yes, sir, I think so. . . . Q. Did you conclude at that time that Mr. Evans did not want any other drillers in there because there would have been a competitive bidding on that amount of work which would have contrasted to the $12.50 per foot that Manu-Mine was making? A. *At this juncture I would say yes.* Q. Isn't that the reason why no further drillers were brought into that area? Didn't Mr. Evans make it pretty clear to you if any other driller was brought in there there might be a question concerning the $12.50 per foot? A. I would gather that much very clearly, that if anything like competitive bidding was accomplished that that figure might be reduced. That is my opinion; yes, sir. Q. Therefore, you would conclude from that that Mr. Evans gave the instruction to go ahead and drill, and drill regardless of the cost, isn't that right? A. Yes, sir. . . . Q. Other than that, you felt the influence that Mr.

Evans exerted was a primary motive behind this contract for renegotiation? A. Yes, there is no doubt about that. Q. And from decision by Mr. Evans you had no redress? Did he have other Commissioners under his thumb, in your opinion, as he had the department heads? A. Mr. Evans as I have said dominated the Commission. He got what he wanted and that refers to the other members of the Commission as well by one method or another. Somehow whatever he wanted to do the Commission agreed to do."

Some of the questions propounded to Paul by the District Attorney were so outrageous that it is astonishing that such an able lawyer would ask a witness for his guesses, inferences, conjectures and conclusions, especially in the light of hindsight. Although the Commonwealth contends otherwise, it is clear and undisputable (see infra) that it placed great reliance upon this testimony of Paul to forge a necessary link in the conviction of Torrance and particularly Evans.

The trial Judge wisely and fairly told the jury that this testimony was admissible only against Paul, and should not be considered against the other defendants.

I have noted the great lengths to which this Court, and particularly the Supreme Court of the United States, goes to protect the basic rights of defendants to a fair trial in accordance with our Constitution, even though the defendants are hardened, dangerous criminals with a long prior record of felony convictions. It seems to me that at least the same concern should be exercised and the same protection should be afforded to men who have up to now enjoyed splendid reputations in this Commonwealth, as is given to hardened criminals. On the basis of these decisions the admission of Paul's Grand Jury testimony—which contains so much that was outrageously incompetent and so much that was highly prejudicial to Evans—constituted incurable reversible error.

Moreover, the difficulty of actually separating it is strikingly apparent from the recent "split-verdict" Act of December 1, 1959, P.L. . Even more importantly, the difficulty of separating and dispelling *these incriminatory terribly damaging guesses and inferences and conclusions against Evans* is aptly expressed and pinpointed by the exceedingly able concurring and dissenting opinion of Judge WOODSIDE: "To emphasize how impossible it was for the jury to follow the Court's instruction not to use this [Paul's] testimony, we need only note that the court itself in its opinion used over 700 words to review Paul's testimony while stating the facts upon which it relied to sustain the conviction of the appellants. Even in the argument before this Court, the District Attorney made extensive use of Paul's Grand Jury testimony to support the conviction of the appellants, particularly Evans. If the judge and the district attorney continue to use Paul's testimony to determine and argue the guilt of the appellants, it is conclusive proof to me that Paul's testimony could not possibly have been ignored by the jury in passing upon the appellants' guilt.

"The evil of the use of this testimony against the appellants is that (1) they had no opportunity to cross-examine their accuser; (2) they had no opportunity to contradict in rebuttal what was said about them; (3) *they had no opportunity to object to and prevent the use of hearsay and other incompetent testimony* given by Paul to the grand jury. *The unfairness of this is so glaring and so basic that it requires the granting of a new trial.* At a new trial, Paul could be called as a Commonwealth witness and could testify to the *facts* contained in his testimony before the grand jury *so far as they are relevant* to the appellants' cases. The defendants would then have the right to cross-examine him and to rebut any untruthful testimony and to have the trial judge limit the testimony to that which is competent. This would give the appellants the fair trial to which they are entitled, and enable the

Commonwealth to obtain the conviction of those whom the evidence would show to be guilty."

I wholeheartedly agree with the above statement by Judge Woodside. While it is very unfortunate that a case of this magnitude has to be retried, in my judgment, the safeguarding of the law and the preservation of the Constitutional guarantees of liberty and due process are paramount, and Justice demands that a new trial be granted Evans.

I would therefore reverse the judgment and sentence against Evans and direct, in his case, a new trial.

Paul's references to Stickler and Landsidle were very different in kind and degree from his incriminating and glaringly incompetent references to Evans and constituted, at most, harmless errors. I concur in the Court's opinion with respect to the appeals of Stickler and of Landsidle.

Mr. Justice Benjamin R. Jones joins in this Concurring and Dissenting Opinion.